UNITED STATES DISTRICT COURT
DISTRICT OF NORTH CAROLINA –
WESTERN DISTRICT

FILED
CHARLOTTE, NC

JUN 2 2017

US District Court
Western District of NC

Civil Action No. 3:15-CV-00366

DUGAN, et. al,

Plaintiffs,

v.

INVICTUS ASSET MANAGEMENT, LLC, INVICTUS CAPITAL GROWTH AND INCOME FUND, LLP INVICTUS HOLDINGS, LLP, TRADEDESK CAPITAL LLC, TRADEDESK FINANCIAL GROUP, INC., TRADESTREAM ANALYTICS, LTD., INVICTUS INCOME FUND, LLP, DAVID W. SCHAMENS, PHILLIPS WIEGAND JR., PILIANA M. SCHAMENS, INVICTUS REAL ESTATE INVESTMENT, LLP, et. al.

Defendants.

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MOTION FOR CONTINUANCE OF HEARING ON MOTION FOR DEFAULT JUDGMENT

Pursuant to Local Civil Rule 7.1, Defendants move the Court for a continuance of the hearing on Plaintiff's Motion for Default Judgment [Doc. #46] currently scheduled for June 2, 2017 at 11:00 AM. In support of this Motion, the Defendants respectfully show the Court the following:

1. Defendants are currently in the process of finalizing and intend to file imminently a motion and supporting brief to enforce the settlement agreement between the parties, or alternatively, to vacate default and for leave to answer. The issues contained in this filing should be considered contemporaneously with Plaintiff's Motion for Default Judgment as the Court's ruling on one motion will have conclusive effect on the other. Due to opposing counsel's interference with pro hac counsel, Defendants are left with no counsel at this time and have been forced to make a motion pro se on just the individuals.
2. "Defendants have only recently retained undersigned pro hac counsel, and she needs additional time to familiarize herself with the matter." This statement was written by former

counsel yesterday. As of 2:53PM, Thursday, June, 1, pro hac counsel withdrew after receiving a call from Mark Kutny, opposing counsel. Upon information and belief, opposing counsel threatened our counsel and she withdrew only minutes later.

3. Defendants intended to file motions for *pro hac vice* of its counsel barred in New Jersey, Richard Meisner and Dennis Gleason with the laws firm of Jardim, Meisner & Susser, PC, who have been involved in the negotiations and discussions surrounding this case and a related state court matter since their inception. Attorneys Meisner and Gleason would appreciate the opportunity to address the issues raised by the Plaintiffs in their Motion for Default Judgment, as well as the forthcoming motion to be filed by the Defendants, upon their acceptance through local pro hac counsel.

4. Numerous motions to continue proceedings, stay proceedings for extensive periods of time have been granted to opposing counsel without Defendants having had the opportunity to respond. One example of such a motion to continue was made on May 2, and the motion was granted on May 4. Other stays have been issued for 90 days or longer. Defendants have never previously asked for a continuance.

5. Defendants need leave from the Court to further file a motion to disqualify opposing counsel. To the point, opposing counsel Hamilton, Stephens represented the Defendants for almost a two year period time during which the allegations of the Complaint are made. Specifically, Keith Merritt and Jack Steele invoiced defendants several times for their services and Defendants promptly paid those invoices. Only several years later, Mark Kutny, partners of Merritt and Steele, and a partner with Hamilton, Stephens contacted the Defendants saying he was representing clients of the Defendants. Defendant's out of state counsel repeatedly warned Kutny of this broad conflict of interest. Kutny refused to address out of state counsel and went ahead and filed the complaint. Defendant's counsel has repeatedly brought this issue to Kutny and he has refused to address it. What has tempered

the objections from reaching the NC State bar or the Court have been several settlements that should have brought dismissals in this action. Instead, now an entry of default exists and Defendants are now forced to act in Court to disqualify counsel.

6. On five different occasions during the past three months, Kutny has called prospective pro hac counsel or communicated in different forms such to discourage Defendant's counsel from continuing despite Defendant's paying all invoices on time. Three pro hac counsel's withdrew before even making an appearance. Two counsels simply declined.

7. A pattern of conduct in using bogus settlements (and negotiations for such settlements) and then obtaining entry of defaults exist by opposing counsel. A pattern of conduct of attempting to prevent Defendants from retaining pro hac counsel so out of state counsel may file pleadings and make an appearance further exists by opposing counsel. The Defendants have a right to counsel and further, there are statutory requirements that the corporate Defendants are represented by counsel.

8. Defendants would not even be in Court had opposing counsel not stolen $75,000 from his firm's trust account and not made an accounting to the Courts. The actions would be dismissed.

Wherefore, the Defendants ask for a continuance of no less than 60 days to retain pro hac counsel, or in the alternative, retain local counsel directly to file the appropriate motions that have already been prepared, but need counsel to file and appear for.

Dated: June 2, 2017

By: ______________________
Piliana M. Schamens

By: ______________________
David W. Schamens

File No. | Law Enforcement Case No. | LID No. | SID No. | FBI No.

CRIMINAL SUMMONS

STATE OF NORTH CAROLINA

Mecklenburg County

In The General Court Of Justice
District Court Division

Offense
NCGS 14-100 - Obtaining Property by False Pretenses

THE STATE OF NORTH CAROLINA VS.

Name And Address Of Defendant
Mark Kutny

201 South College Street, Suite 2020
Charlotte, NC 28244

(704) 227-1051

Race	Sex	Date Of Birth	Age
W	M		

Social Security No. | Drivers License No. & State

Name Of Defendant's Employer
Hamilton Stephens Steele + Martin, PLLC

Offense Code(s)
Obtaining Property under False Pretenses

Offense In Violation Of G.S.
14-100

Date Of Offense
04/08/2016

Date Of Arrest & Check Digit No. (As Shown On Fingerprint Card)

Complainant (Name, Address Or Department)

TradeDesk Financial Group, Inc.
10130 Perimeter Blvd, Suite 200
Charlotte, NC 28216
(704) 503-1110

Names & Addresses Of Witnesses (Including Counties & Telephone Nos.)
William Trosch
Casey Couch
301 South McDowell Suite 809
Charlotte, NC 28202
(704) 553-8221

☒ Misdemeanor Offense Which Requires Fingerprinting Per Fingerprint Plan

Date Issued
06/02/2017

To the defendant:

I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above you unlawfully and willfully did

knowingly and designedly by means of false pretense, conspire and obtain from the Complainants a sum of $75,000 with intent to cheat or defraud the Complainants and its officers.

On or about December 14, 2014, the Defendant, along with other criminal Defendants Guy M. Dugan, Mark Dugan, and Karen Dugan, filed a civil complaint (14-CVS-22820), using a shell entity called Aggie Investment as the Plaintiff, in Mecklenburg County Superior Court seeking to attach the assets of TradeDesk Financial Group, Inc. as well as assets of its officers, including the personal residence of that officer and President, David W. Schamens. On March 9, 2016, the complaint was settled with terms reading as follows: "after receipt of the First Payment in the amount of Seventy-Five Thousand Dollars and NO/100 ($75,000.00), the parties shall execute and file a Stipulation of Dismissal, without prejudice, of all claims in the Aggie Lawsuit" (see Exhibit A)

On April 8, 2016, after oral extensions of time by the Defendant Kutny stipulating that such wire must be received no later than April 8, 2016 (see Exhibits B and C), a wire was sent by TradeDesk Financial Group, Inc. the morning of April 8, 2016, and accepted by Mark Kutny and the other criminal Defendants in the amount of $75,000 (see Exhibit D).

Late the afternoon of April 8, 2016, after such wire was sent to the Defendant, instead of filing a Stipulation of Dismissal of all claims per the settlement agreement, Kutny and the other criminal Defendants, with fraudulent intent to violate NCGS 14-100, filed a motion for a default judgment, seeking a constructive trust to take possession of the Schamens' personal residence. Upon a hearing by the Superior Court in June 2016, Kutny represented under oath that the $75,000 was being held in his trust account, upon which counsel made a firm written request for those funds to be returned. Kutny has refused and made no accounting or filings whatsoever as to where the funds have disappeared.

This act was in violation of the law referred to in this Criminal Summons. This Summons is issued upon information furnished under oath by the complainant listed. You are ORDERED to appear before the Court at the location, date and time indicated below to answer to the charge. If you fail to appear, an order for your arrest may be issued and you may be held in CONTEMPT OF COURT. Arrest and/or contempt for failure to appear is in addition to any sentence which may be imposed for the crime charged.

☐ The undersigned finds the following cause to set a court date more than one month from the issue of this summons: ____

Signature

☒ Magistrate ☐ Deputy CSC
☐ Assistant CSC ☐ Clerk Of Superior Court

Location Of Court
Mecklenburg County

Court Date

Court Time
☐ AM ☐ PM

(Over)

AOC-CR-113, Rev. 4/14
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